

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2049

To be submitted

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2049

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS LENTINI,

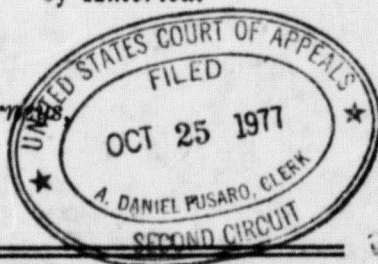
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BETTY SANTANGELO,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*



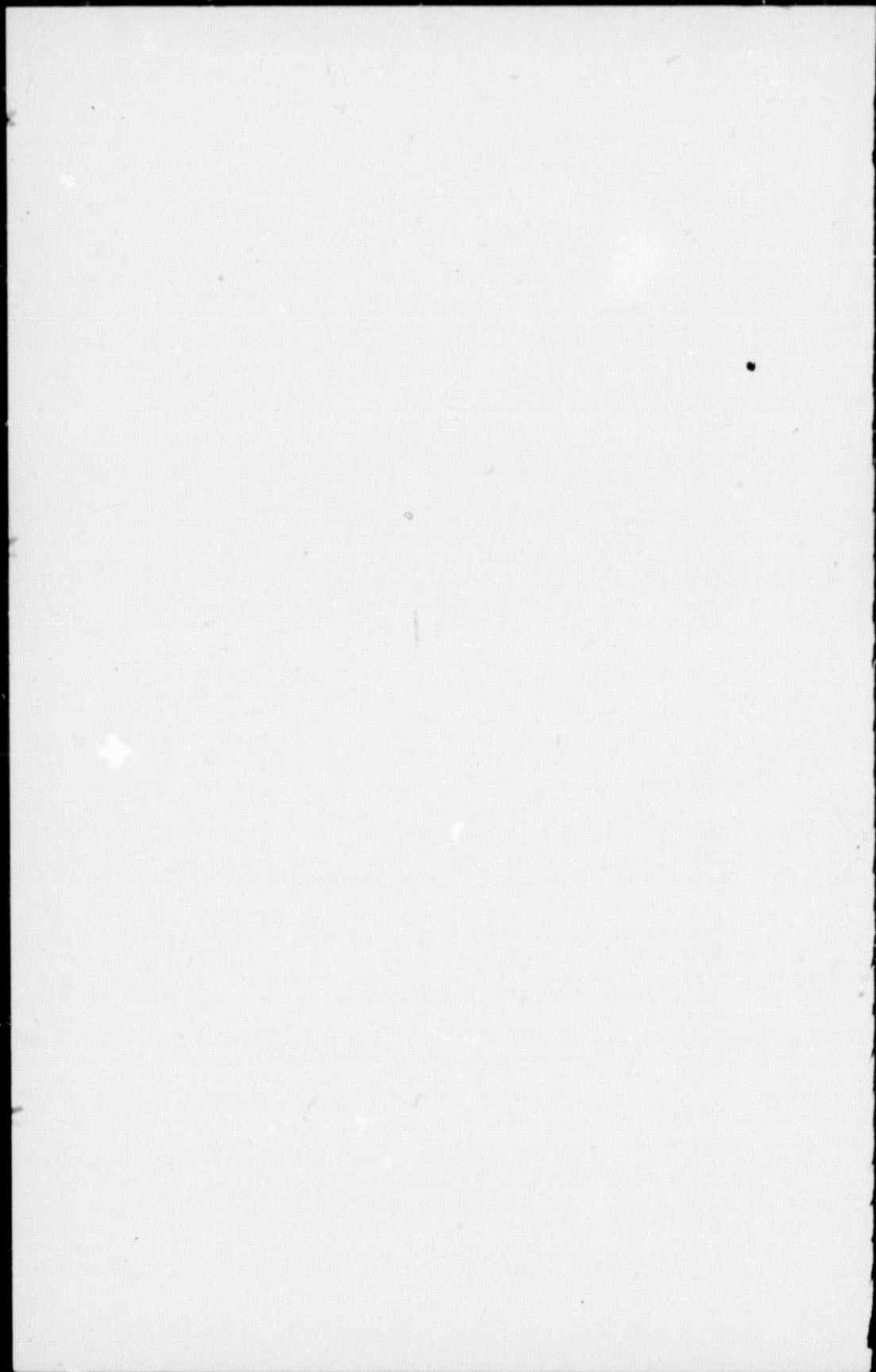


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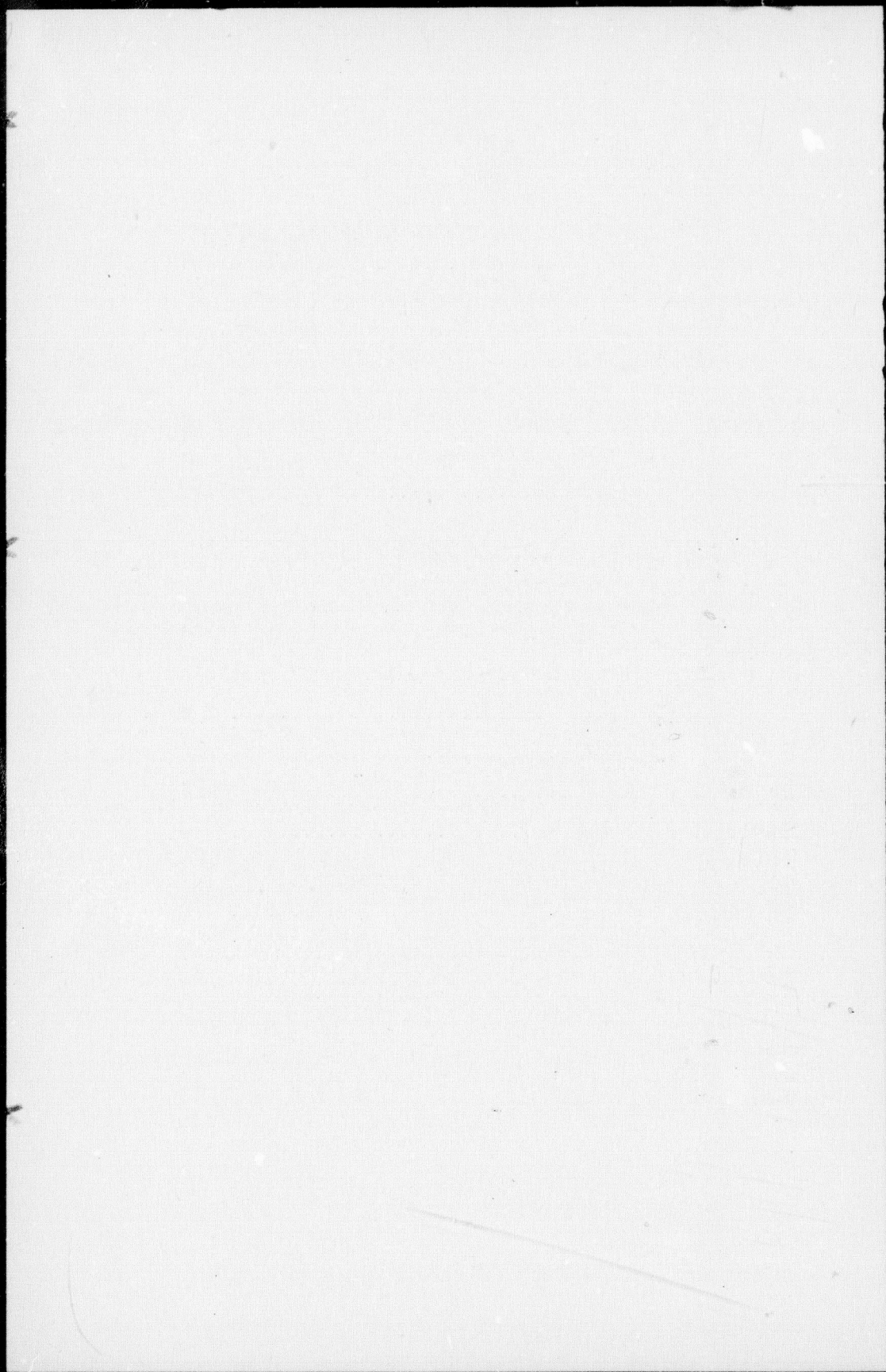
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Appellee,

—v.—

THOMAS LENTINI,

Petitioner-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Lentini appeals from an order filed on March 25, 1977 in the United States District Court for the Southern District of New York by the Honorable Kevin T. Duffy, United States District Judge, denying Lentini's motion to reargue the denial of a petition pursuant to 28 U.S.C. § 2255 seeking withdrawal of his plea of guilty entered on January 8, 1974, and vacation of the judgment of conviction entered therein.

Indictment 73 Cr. 1099, filed December 6, 1973 charged Thomas Lentini along with Carmine Tramunti and thirty others with thirty counts of violation of the Federal narcotics laws. Lentini was named in five of the thirty counts.

Count One charged all thirty-two defendants, including Lentini, with conspiracy to violate the narcotics laws from January 1, 1969 until December 6, 1973, the date

of the filing of the indictment, in violation of Title 21, United States Code, Sections 173, 174 and 846. Counts Twenty-three and Twenty-four charged Lentini, along with several co-defendants, with distributing and possessing with intent to distribute on two separate occasions approximately three kilograms of heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Counts Twenty-eight and Twenty-nine charged Lentini, along with other co-defendants, with distributing and possessing with intent to distribute in May of 1973 respectively, one-half kilogram, and one-eighth kilogram of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

On January 8, 1974 Lentini entered a plea of guilty before Judge Duffy to Counts One and Twenty-three of the indictment.

Trial proceeded against eighteen of the remaining defendants * one week later and resulted in the convictions of fifteen of them for both the conspiracy and all the related substantive offenses.**

* Prior to trial, two other defendants pleaded guilty. The Government severed the cases of the remaining defendants, all but two of whom were fugitives at the time of trial. George Tatouian, a defendant in indictment 73 Cr. 1099, was murdered prior to trial. One of the defendants named in the superseded indictment, 73 Cr. 931, Jack Spada, was also murdered prior to trial and "was found riddled with bullets and with both hands hacked off at the wrists". *United States v. Mallah*, 503 F.2d 971, 976 n.2 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

** Judge Duffy entered a judgment of acquittal at the end of all the evidence with respect to the defendant Joseph Marchese. The case against Al Greene was severed when he fell down a flight of stairs and fractured his skull during the trial. The jury convicted all defendants whose guilt was submitted to them except one. The jury was unable to reach a verdict as to one defendant who, according to the trial testimony, was one of the most decorated police officers in the history of the New York City Police Department. An order of *nolle prosequi* was subsequently entered with respect to the case against him.

On appeal, the convictions of thirteen defendants were affirmed by this Court, which concluded that the evidence at trial "established the existence of a large, well organized conspiracy to buy, process and distribute narcotics in New York, New Jersey and Washington, D.C." *United States v. Tramunti*, 513 F.2d 1087, 1094 (2d Cir. 1975). The Supreme Court denied certiorari, 423 U.S. 832 (1975).

On April 26, 1974 Judge Duffy sentenced Lentini to fifteen years' imprisonment on each count, to run concurrently, and to be followed by 10 years' special parole. The prescribed term of imprisonment was also to run concurrently with a term of imprisonment previously imposed, pursuant to 18 U.S.C. § 4208(a)(2), by Judge Charles L. Brieant, Jr. on October 10, 1973, after Lentini's plea of guilty to Indictments 73 Cr. 327 and 73 Cr. 651.

Almost two years later, on February 2, 1976, Lentini filed a petition pursuant to 28 U.S.C. § 2255, seeking to vacate his sentence and to withdraw his guilty plea, or in the alternative, for an evidentiary hearing, on the grounds that Lentini was not advised of the consequences of his plea in accordance with Rule 11, Fed. R. Crim. P. Specifically, Lentini asserts that he was not advised of the consequences of his plea in three respects. First, he contends that he was not advised that the Court was required to impose at least a three year term of special parole to follow any term of imprisonment. Secondly, he claims that he was not advised that pursuant to 18 U.S.C. § 4202 he would not be eligible for parole until he had served one-third of his sentence. Third, he contends that he was not advised that his term of imprisonment could exceed the 11-year term of imprisonment he was then serving.

Additionally, Lentini raises the claim that he was assured by his attorney that the sentence imposed by

Judge Duffy would be concurrent with the term of imprisonment he was then serving.

On February 4, 1977 Judge Duffy denied the petition without a hearing. On March 25, 1977, Lentini renewed his motion for a hearing on the motion to vacate his plea. Judge Duffy treated the renewed motion as a motion to reargue the denial of the petition pursuant to 28 U.S.C. § 2255 and in a memorandum order dated March 25, 1977 again denied the petition without a hearing.

This appeal followed.

Statement of Facts

On January 8, 1974 Thomas Lentini pleaded guilty to two counts—Counts One and Twenty-three—of the indictment, 73 Cr. 1099. Lentini thereby acknowledged his involvement in an extensive narcotics conspiracy and in the distribution of three kilograms of heroin in July of 1972.

At the time of his plea, the District Court explained to Lentini and his counsel, Gino Gallina, Esq., that the Court had to make a finding that the plea was voluntary and that the defendant was aware of his rights before the Court could accept the plea. The court therefore inquired of the defendant as follows:

"... do you understand the consequences of your plea and in fact that you are guilty?

Do you know that I need not accept the plea unless I am satisfied of your guilt, and that you understand fully your rights, do you know that?"
(Tr. 3).*

* References to the transcript of the plea of January 8, 1974 are abbreviated as "Tr." References to the transcript of sentence of April 26, 1974 are abbreviated as "Sent. Tr."

Having received an affirmative response to the above question, the District Court continued to make inquiry concerning the defendant's full understanding of his rights, and the facts underlying the defendant's proffered plea of guilty. Specifically, the court made a detailed inquiry into any misconceptions the defendant might have fostered with respect to his sentence:

THE COURT: Have you discussed with your counsel the range of penalties which could be imposed by this Court on a plea of guilty including what possible maximum sentence may be?

THE WITNESS: Yes, your Honor.

THE COURT: Mr. Phillips, . . .

What is the maximum sentence on the conspiracy count?

MR. PHILLIPS: The maximum sentence on both conspiracy and substantive counts would be fifteen years except Mr. Lentini is a second offender so theoretically could receive a sentence of up to thirty years.

THE COURT: All right, Mr. Lentini, do you understand that?

THE WITNESS: Yes, your Honor.

THE COURT: Have any threats or promises been made to induce you to plead guilty?

THE WITNESS: No, your Honor.

THE COURT: Do you believe that there is any understanding between anyone and me or the government attorneys as to what sentence you might receive?

THE WITNESS: No, your Honor.

THE COURT: Has anyone ventured to make a prediction as to what sentence may be imposed?

THE WITNESS: No, your Honor. (Tr. 5-6).

The defendant Lentini was thus advised that upon his plea of guilty that he faced up to fifteen years of imprisonment on the counts against him. Moreover, the defendant was further advised, although the Government never actually charged him as such, that if the Government filed an information charging him as a second felony offender, he could be subject to a term of thirty years' imprisonment.

Counts One and Twenty-three charged Lentini with violation of Title 21, United States Code, Sections 846 and 812, 841(a)(1) and 841(b)(1)(A), the Federal narcotics laws which apply to violations occurring on or after May 1, 1971.* These counts carry no minimum penalty, a maximum of 15 years imprisonment and a special parole term of three years which must follow any term of incarceration. Title 21, United States Code, Sections 841(b)(1)(A), 846 and 851.

Two weeks after Lentini pleaded guilty, trial proceeded against eighteen of his co-defendants who were available for trial. The evidence at trial disclosed that the Government witness Frank Stassi on at least two occasions, along with the defendant Joseph Del Vecchio, participated with Lentini in "mixing sessions," some at Stassi's apartment, some at Del Vecchio's. 513 F.2d at 1096. In each of these, Lentini, Stassi and Del Vecchio mixed three kilograms of heroin with the dilutant mannite to obtain 12 half-kilogram packages. 513 F.2d at 1096.

* Count One also charged a violation of Title 21, United States Code, Sections 173 and 174, the federal narcotics laws which apply to violations occurring prior to May 1, 1971. Since Lentini's admissions of involvement in the conspiracy relate only to activities after 1971, the "old law" aspect of Count One is not relevant here.

On April 26, 1974 Judge Duffy sentenced Lentini pursuant to the provisions of 18 U.S.C. § 4202 to fifteen years' imprisonment on each count, followed by ten years of special parole, to commence upon completion of his prison term. Both sentences were to run concurrently with each other and with the sentence previously imposed by Judge Brieant.

The sentence previously imposed by Judge Brieant on October 10, 1973 related to a plea of guilty by Lentini to violations of the federal narcotics laws. With respect to Indictment 73 Cr. 651, he was sentenced to a term of five years on each of three counts—Counts 1, 3 and 4—and 11 years on Count 2. With respect to Indictment 73 Cr. 327 he was sentenced to 11 years on each of Counts 1 through 5, inclusive, to be followed by a 10 year special parole, upon expiration of the prison term. 21 U.S.C. § 841. All sentences were to be served concurrently, and in accordance with 18 U.S.C. § 4208(a) (2) providing for parole eligibility at such time as the Board of Parole may determine.

Prior to the imposition of sentence on Lentini by Judge Duffy, the United States Attorney addressed the Court with respect to the sentence facing Lentini, and specifically referred to the penalty of a 3-year special parole term on each count to which the defendant had pled guilty. Although Judge Duffy failed to advise Lentini of the mandatory special parole term, no suggestion was made at that time by Lentini or by his attorney Mr. Gallina that the special parole term—or, indeed, the sentence—came as a surprise. To the contrary, Mr. Gallina, the defendant's attorney, observed to the Court immediately after the imposition of sentence that "the defendant wishes to express his feelings that the sentence is a just one." (Sent. Tr. 115). Nor should Lentini have been surprised since he had received precisely the same special parole term to follow the sentence imposed by Judge Brieant.

However, Mr. Gallina did request the Court that the sentence be served pursuant to the parole provisions of 18 U.S.C. § 4208(a)(2). Judge Duffy rejected this application, and imposed sentence instead pursuant to 18 U.S.C. § 4202, rendering Lentini eligible for parole only after he had completed one-third of the sentence imposed. Again no suggestion was made by the defendant or his attorney that the sentence was a surprise or that it failed to comply with any plea agreement previously reached.

Lentini did not appeal his guilty plea or sentence.

On February 2, 1976, almost two years after sentencing, Lentini filed his present petition pursuant to 28 U.S.C. § 2255. No affidavit was submitted by the attorney for the petitioner in support of the petition. The only support for the *pro se* petition is a sworn affidavit in the form of a brief submitted by the petitioner in which Lentini merely claims (a) that the record establishes that Judge Duffy did not comply with the provisions of Rule 11 and (b) that Lentini was advised by his attorney that if he pleaded guilty, he would receive a term of imprisonment to run concurrently with the 11 year term of imprisonment he was then serving and to be served pursuant to the provisions of 18 U.S.C. § 4208(a)(2). Significantly, Lentini in his affidavit did not claim that he would not have entered his guilty plea had Judge Duffy advised him of the mandatory special parole term.

ARGUMENT

The District Court Properly Denied Lentini's Petition.

A. Claims Under Rule 11

Lentini's primary challenge to his guilty plea, pursuant to 28 U.S.C. § 2255, is his claim that Judge Duffy failed to advise him of the consequences of his guilty plea, as required by Rule 11 of the Federal Rules of Criminal Procedure.* First, he contends that Judge Duffy failed to advise him of the minimum three year term of special parole which automatically follows a term of incarceration pursuant to Title 21, United States Code, Sections 841(b) (1) (A), 846 and 851. Secondly, he argues that Judge Duffy neglected to advise him that pursuant to the parole provisions of Title 18, United States Code § 4202, he would not be eligible for parole until he had completed one-third of his sentence. Third, Lentini claims that he was never informed that the sentence imposed by Judge Duffy could exceed the 11 year term of imprisonment he was then serving. Lentini argues that the District Court's failure to inform him of the consequences of his plea in compliance with Rule 11, entitles him, under *McCarthy v. United States*, 394 U.S. 459 (1969) to withdraw his guilty plea. Since each of the three aspects of this claim raise discrete issues, they will be dealt with *seriatim*.

* At the time of Lentini's guilty plea, Rule 11 read in pertinent part as follows:

"The court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Rule 11 was amended effective August 1, 1975. See generally *United States v. Journeet*, 544 F.2d 633, 635 (2d Cir. 1976).

1. Lentini Cannot Demonstrate That He was Prejudiced By the District Court's Failure to Advise Him of the Terms of Special Parole

A necessary starting point in the determination whether Lentini is entitled to relief on his claim that Judge Duffy failed to advise him of the provisions of mandatory special parole* is this Court's decision in *Del Vecchio v. United States*, 556 F.2d 106 (2d Cir. 1977). *Del Vecchio* involved a similar challenge by Lentini's co-defendant to the District Court's failure to advise Del Vecchio prior to his guilty plea of, among other things, the mandatory term of special parole. In that case, as here, *Del Vecchio* challenged the validity of the guilty plea, collaterally, rather than directly, by way of a petition pursuant to 28 U.S.C. § 2255. This Court there held, that before such relief could be granted, "a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea." 556 F.2d at 111. (emphasis supplied). Applying this standard to the facts of this case, Lentini's petition cannot succeed.

First, quite apart from his failure to claim that he was in fact unaware of the possibility of a mandatory special parole term, Lentini made no claim below that he would have acted any differently had Judge Duffy advised him that he subjected himself by his guilty plea to a mandatory special parole term, as required by *Bye v. United States*, 435 F.2d 177, 179 n.5 (2d Cir. 1970). Indeed, Lentini could not credibly make a claim that he was ignorant of or misled about his alternatives at the time of the plea. Not only was Lentini a hardened criminal who had twice be-

* Special parole is "a period of supervised release after expiration of the regular sentence, violation of the terms of which would result in . . . reconfinement for the entire length of the special parole term. 21 U.S.C. § 841(c)." *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975).

fore been convicted of a separate narcotics offense, *Del Vecchio, supra*, at 111, but he had been sentenced only 3 months before the date of his plea to an 11 * year term of imprisonment *followed by a 10-year term of special parole*. Moreover, as this Court had occasion to note in *Del Vecchio, supra*, at 111, the attorney representing Lentini at the time of his guilty plea was a very experienced attorney. Given this fact, as well as the fact that at the time of plea Lentini acknowledged before the District Court his prior discussions with counsel as to the range of penalties to be imposed, there is little basis for believing that Lentini was unaware of the consequences of his plea.*

More importantly, the sentence imposed on Lentini—15 years' imprisonment on each count and 10 years' special parole—was ordered by Judge Duffy to be served concurrently with each other and with the sentence Lentini was then serving—11 years' term of imprisonment and 10 years' special parole. Thus, since Lentini had already been sentenced to a 10-year special parole term by Judge Brieant, the imposition of a concurrent 10-year term of special parole did not work to his disadvantage in any way. Moreover, the sentence imposed by Judge Duffy was considerably less than the sentence of which Lentini had been advised since Judge Duffy could have imposed a sentence of 15 years on each count to be served consecutively to each other, as well as to the term of imprisonment Lentini was then serving. Under these circumstances, Lentini

* It should be noted that Lentini has never presented any affidavit from his attorney indicating that the attorney did not advise Lentini of the mandatory special parole term. As this Court has noted, when a section 2255 petition claims ignorance or misunderstanding on an issue about which the defendant's attorney had knowledge, failure to present an affidavit from the attorney is itself reason to deny a claim without holding a hearing. *United States v. Wisniewski*, 478 F.2d 274, 284 (2d Cir. 1973); *United States v. Santelises*, 476 F.2d 787, 790 n.3 (2d Cir. 1973); *Grant v. United States*, 451 F.2d 931, 933 (2d Cir. 1971).

cannot demonstrate any prejudice from the sentence he actually received.*

2. The District Court Was Not Required to Advise Lentini of the "Regular Parole" Provisions of Title 18, United States Code § 4202

Pursuant to the sentence imposed by Judge Duffy, Lentini would be eligible for parole in accordance with the provisions of Title 18, United States Code, § 4202, then in effect.** Under Section 4202, parole is generally available to a prisoner after serving one-third of his sentence. *Bye v. United States, supra*, 435 F.2d at 178. In the instant case, Judge Duffy specifically rejected a request by a defense counsel made, at the time of sentence, to apply the parole provisions of Title 18, United States Code, § 4208(a)(2) which would render the defendant eligible for parole at such time as the Board of Parole may determine. Neither Lentini nor his defense counsel expressed any surprise at the denial of this request.

* Indeed it is appropriate to note that not only is Lentini not prejudiced by the District Court's failure to advise him of the mandatory term of special parole, but he would also be the beneficiary of an extraordinary and ill-deserved windfall if the Court were to accept his argument. Since the time of his guilty plea and the *Tramunti* trial, Frank Stasi, the principal witness against him (see 513 F.2d at 1096), died. It would thus now—two years after his plea of guilty—be difficult and probably impossible for the Government to demonstrate Lentini's self-confessed complicity in the overwhelmingly hardened and vicious criminal activities of which he was a part. In such a case, the prejudice would only accrue to the public.

** Title 18, United States Code, Section 4202, provided in relevant part:

"A Federal prisoner . . . wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms. . . ."

Lentini, almost two years later, now challenges the District Court's failure to inform him of the fact that he would not be eligible for parole until he had served one-third of his prison sentence. The short answer to this contention is that the application of the regular parole provisions of Section 4202 is not a direct consequence of a guilty plea. Thus the failure to advise a defendant of these provisions does not violate Rule 11.

This Court held in *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974) that "Rule 11 does not affect the long-standing rule in this as well as other circuits that the trial judge when accepting a plea of guilty is not bound to inquire whether a defendant is aware of the collateral effects of his plea." Therefore a defendant "need not be informed prior to the acceptance of his guilty plea about every conceivable collateral effect the conviction entered on the plea might have." *Bye v. United States*, *supra*, 435 F.2d at 179 (emphasis supplied). For example, an accused need not be informed that his conviction might result in deportation, *Michel v. United States*, *supra*; or in loss of a passport, *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964) (*per curiam*), *cert. denied*, 380 U.S. 916 (1965), or in the deprivation of the right to vote, *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963), or in loss of good time credit, *Hutchinson v. United States*, 450 F.2d 930, 931 (10th Cir. 1971) (*per curiam*). In contrast, a defendant should be advised of any consequences of his plea which will have a major effect on the length of his incarceration. See *Bye v. United States*, *supra*, 435 F.2d at 180. Thus, this Court has held that an accused must be advised of such consequences as a special parole term, which can result in an increase in the original term of imprisonment by the entire period of the term, *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975), and ineligibility for parole, which multiplies by three the period of time a prisoner must serve before he is eligible for parole, *Bye v. United States*, *supra*.

Analysis of the "regular parole" provisions of 18 U.S.C. § 4202 makes evident that it is not a consequence of a defendant's plea of which he must be informed pursuant to Rule 11 for two discrete reasons. First, regular parole does not have a major effect on the length of a defendant's incarceration. The essence of parole is a conditional release from prison before sentence is served, a violation of which usually results, at the most, in being returned to prison for the remainder of one's sentence. *United States v. Richardson*, 483 F.2d 516, 519 (8th Cir. 1973). Essentially, regular parole prescribed by 18 U.S.C. § 4202 does not increase in any way the period of time a defendant can expect to be incarcerated. Rather, it reduces the period of incarceration and provides for the general eligibility of defendants for parole after completion of one-third of sentence. Thus it is not the type of consequence of which a defendant must be advised prior to his plea of guilty. Indeed, in analyzing the types of consequences of which a defendant should be advised, the Court of Appeals for the Seventh Circuit noted that traditional parole provisions are remote contingencies, rather than direct consequences of a plea of guilty:

"... the date the defendant will be eligible for parole will depend on whether the judge leaves it to be governed by 18 U.S.C. § 4202; specifies an eligibility date before the expiration of one-third of the sentence, as permitted by 18 U.S.C. § 4208 (a) (1); or specifies that the prisoner shall be eligible at such time as the board of parole may determine, as permitted by 18 U.S.C. § 4208 (a) (2). *These contingencies are too remote from the considerations that may reasonably be expected to motivate a defendant's plea decision to be of legal significance.*" *Bachner v. United States*, 517 F.2d 589, 597 (7th Cir. 1975) (emphasis supplied).

Moreover, it is generally assumed that the average defendant understands the traditional concepts of parole. *United States v. Richardson*, *supra*, 483 F.2d at 519 n.6; *Moody v. United States*, 469 F.2d 705, 708 (8th Cir. 1972); *Durant v. United States*, 410 F.2d 689, 692 (1st Cir. 1969); see *United States v. Del Vecchio*, *supra*, at 112. Indeed, this Court has noted that the availability of regular parole is a general expectation of defendants accused under our system of criminal justice. *Bye v. United States*, *supra* at 181. For this reason, Rule 11 does not require that a defendant be advised before a plea of guilty is accepted, of the provisions of regular parole. *Bunker v. Wise*, 550 F.2d 1155, 1158 (9th Cir. 1977); *Roberts v. United States*, 491 F.2d 1236, 1238 (3d Cir. 1974); *Bye v. United States*, *supra* (by implication).

Finally, it would be particularly inappropriate in the context of this case to permit Lentini to collaterally challenge his conviction on these grounds almost two years after the imposition of sentence. Not only did Lentini fail to raise an objection to Judge Duffy's refusal to apply the provisions of 18 U.S.C. § 4208(a)(2) at the time of sentencing, but Lentini also failed to raise the issue on direct appeal. As this Court has noted, a collateral attack on a guilty plea made "only belatedly" should be viewed with particular circumspection, *Seiller v. United States*, 544 F.2d 554 at 568 (2d Cir. 1975), and does not merit a hearing. Given the equities of the Government's present inability to try Lentini for his admitted participation in the crimes for which he was charged, Lentini's delay in complaining of what he was not told at the time of his guilty plea not only undermines any contention that he was not aware of the regular parole term (which, at the very least, must have been clear to him at the time of sentence) but should bar him from receiving present relief.

3. The District Court Fully Advised the Defendant of the Possible Prison Terms Which Could Be Imposed

The final aspect of Lentini's Rule 11 claim is his contention that he was never advised that the sentence imposed by Judge Duffy could exceed the 11 year term of imprisonment he was then serving. As the record of the plea proceedings before Judge Duffy establishes, Lentini was clearly advised that the counts against him carried a term of imprisonment of up to fifteen years. Indeed, Judge Duffy further informed him that this term of imprisonment could be doubled if the Government filed a second felony offender information. Under these circumstances, Lentini's contention that he was not advised that his term of imprisonment could exceed the eleven year sentence he was then serving could only be characterized as specious.

B. Predictions by Counsel

Finally, Lentini challenges his guilty plea on the ground that he was advised by counsel to enter a plea of guilty with an assurance that his sentence would be imposed concurrently with the sentence he was then serving. This latter claim can be swiftly answered. In the first instance, the record of the proceedings before Judge Duffy at the time Lentini's plea was accepted, belies any assertion that Lentini had been made any promises with respect to the sentence to be imposed on him. *Compare Bye v. United States, supra*, 435 F.2d at 178 n.3. Secondly, Lentini's claims is without merit since in fact the sentence actually imposed by Judge Duffy was to be served concurrently with the sentence he was then serving. Finally, even if the sentence imposed by Judge Duffy varied in some respect with Lentini's erroneous expectation as to sentence, an expectation based on

a mistaken estimate of defense counsel would not vitiate a plea of guilty. *Seiller v. United States*, *supra*, 544 F.2d at 568; *United States ex rel. Scott v. Mancusi*, 429 F.2d 104, 108 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

It should be noted that Lentini has never presented an affidavit from his attorney, indicating that his attorney gave him any advice with respect to the sentence he could expect to receive. As we noted earlier in our brief, when a Section 2255 petition claims ignorance or misunderstanding on an issue about which the defendant's attorney had knowledge, failure to present an affidavit from the attorney is itself reason to deny a claim without holding a hearing. *United States v. Wisniewski*, *supra*; *United States v. Santelises*, *supra*; *Grant v. United States*, *supra*. In this context, a plea taken on the advice of defense counsel that the sentences would be concurrent has been held not to render a plea involuntary, *Thomas v. United States*, 426 F. Supp. 621 (E.D. Tenn. 1975), *aff'd*, 546 F.2d 425 (6th Cir. 1976).

Moreover, the absence of such an affidavit in this case is somewhat explained by the record of proceedings before Judge Duffy at the time of the plea. At that time the defendant's attorney stated:

"I have indicated to [the defendant] in a discussion, your Honor, that no promises have been made by either the Court or the prosecutor or any other governmental agent concerning his plea to these counts." (Tr. 2).

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BETTY SANTANGELO,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)

COUNTY OF NEW YORK)

ss.: *Betty Santangelo*

being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *25th* day of *October*
1977, he served a copy of the within *2* copies of Brief For
by placing the same in a properly postpaid franked *United States*
envelope addressed:

Thomas J. Lentini
United States Penitentiary
Box PMB - 78283 - 158
Atlanta, Georgia 30315

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mail-
ing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Betty Santangelo

Sworn to before me this
25 day of *October*, 1977

Glady D'Angelo

GLADYS D. D'ANGELO
Notary Public, State of New York
County of Suffolk
Ex. Comm. No. 30, 1979

